14-3648-cv

To Be Argued By:
ROBERT J. GIUFFRA, JR.

IN THE

United States Court of Appeals
FOR THE SECOND CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION,
As Receiver for Colonial Bank,

Plaintiff-Appellant,

—against—

FIRST HORIZON ASSET SECURITIES, INC., FIRST HORIZON HOME LOAN CORPORATION, CREDIT SUISSE SECURITIES (USA) LLC, DEUTSCHE BANK SECURITIES INC., FTN FINANCIAL SECURITIES CORP., HSBC SECURITIES (USA) INC., RBS SECURITIES INC., UBS SECURITIES LLC, WELLS FARGO ASSET SECURITIES CORPORATION,

Defendants-Appellees,

CHASE MORTGAGE FINANCE CORP., JP MORGAN CHASE & CO., JP MORGAN SECURITIES LLC, CITICORP MORTGAGE SECURITIES, INC., CITIMORTGAGE, INC., CITIGROUP GLOBAL MARKETS INC., ALLY SECURITIES LLC, MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
(NO. 12-CV-6166) (HON. LOUIS L. STANTON)

BRIEF OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Defendants-Appellees First Horizon Asset Securities, Inc. and FTN Financial Securities Corp. are wholly owned by First Tennessee Bank National Association, which in turn is the successor-in-interest by merger to Defendant-Appellee First Horizon Home Loan Corporation. First Tennessee Bank National Association is wholly owned by First Horizon National Corporation, which has no parent corporation, and no publicly held company owns 10% or more of its stock.

Defendant-Appellee Credit Suisse Securities (USA) LLC is wholly owned by Credit Suisse (USA), Inc., which in turn is wholly owned by Credit Suisse Holdings (USA), Inc., which in turn is jointly owned by Credit Suisse AG and Credit Suisse Group AG. Credit Suisse AG is wholly owned by Credit Suisse Group AG, which has no parent corporation, and no publicly held company owns 10% or more of its stock.

Defendant-Appellee Deutsche Bank Securities Inc. is wholly owned by DB U.S. Financial Markets Holding Corporation, which in turn is wholly owned by DB USA Corporation, which in turn is a wholly owned subsidiary of Deutsche Bank AG. Deutsche Bank AG has no parent corporation, and no publicly held company owns 10% or more of its stock.

Defendant-Appellee HSBC Securities (USA) Inc. is wholly owned by HSBC Holdings plc, which has no parent corporation, and no publicly held company owns 10% or more of its stock.

Defendant-Appellee RBS Securities Inc. is wholly owned by RBS Holdings USA Inc., which in turn is wholly owned by NatWest Group Holdings Corporation, which in turn is wholly owned by National Westminster Bank plc, which in turn is wholly owned by The Royal Bank of Scotland plc, which in turn is wholly owned by The Royal Bank of Scotland Group plc. The Royal Bank of Scotland Group plc has no parent corporation, and no publicly held company owns 10% or more of its stock.

Defendant-Appellee UBS Securities LLC is wholly owned by UBS Group AG, which has no parent corporation, and no publicly held company owns 10% or more of its stock.

Defendant-Appellee Wells Fargo Asset Securities Corporation is wholly owned by Wells Fargo Bank, N.A., which in turn is wholly owned by Wells Fargo & Company, which has no parent corporation, and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE ISSUES

1. Whether the District Court (Stanton, J.), in light of the Supreme Court's 7-to-2 decision in *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175 (2014), correctly held that the so-called "extender" provision of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1821(d)(14)(A)—which, by its terms, extends only "the applicable statute of limitations" for certain "contract" or "tort" claims brought by the Federal Deposit Insurance Corporation ("FDIC") as the receiver of a failed bank—does not expressly or impliedly repeal the three-year statute of repose in the Securities Act of 1933, 15 U.S.C. § 77m.[1]

2. Whether FIRREA's extender provision applies to federal Securities Act claims.

STATEMENT OF THE CASE

On August 10, 2012, the FDIC, as receiver for Colonial Bank ("Colonial"), brought this action against Appellees alleging violations of Sections 11 and 12 of the Securities Act in connection with the sale and underwriting of eight securities that Colonial purportedly had purchased in

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[1] The relevant statutory provisions, 12 U.S.C. § 1821(d)(14) and 15 U.S.C. § 77m, are reproduced in the Appendix to this Brief.

2007. Because the FDIC filed its complaint approximately five years after Appellees' sale and underwriting of those securities, the Securities Act's three-year statute of repose expressly barred the FDIC's Section 11 and 12 claims.[2]

The FDIC's only argument for saving its Securities Act claims is based on FIRREA's so-called "extender" provision, 12 U.S.C. § 1821(d)(14)(A). According to the FDIC, this provision—which refers to extending only the "statute of limitations" under "State law" for certain "contract" and "tort" claims—impliedly repeals the Securities Act's statute of repose for claims brought by the FDIC in its capacity as receiver.[3]

The District Court correctly rejected the FDIC's argument. Specifically, Judge Stanton held that FIRREA's extender provision, by its

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[2] The Securities Act's statute of repose provides: "In no event shall any such action be brought to enforce a liability created under [Sections 11 and 12(a)(1) of the Act] more than three years after the security was bona fide offered to the public, or under [Section 12(a)(2) of the Act] more than three years after the sale." 15 U.S.C. § 77m.

[3] Section 1821(d)(14) is one of three materially identical extender provisions that apply to certain claims brought by federal agencies in their capacities as conservators or receivers for troubled or insolvent financial institutions. The other two extender provisions apply to the Federal Housing Finance Agency ("FHFA"), 12 U.S.C. § 4617(b)(12), and the National Credit Union Administration Board ("NCUA"), 12 U.S.C. § 1787(b)(14).

terms, affects only the "statute of *limitations*" for contract and tort claims brought by the FDIC, 12 U.S.C. § 1821(d)(14) (emphasis added), not the Securities Act's statute of *repose*. Although this Court in *FHFA* v. *UBS Americas Inc.*, 712 F.3d 136 (2d Cir. 2013) ("*UBS*"), ruled that an extender provision in the Housing and Economic Recovery Act of 2008 ("HERA"), 12 U.S.C. § 4617(b)(12), displaced the Securities Act's three-year repose period, Judge Stanton correctly recognized that the Supreme Court's subsequent decision in *CTS* requires a contrary result. J.A. 168, 173–77. This Court should affirm.

First, as Judge Stanton held, *CTS* provides the governing legal framework for determining the scope of a federal extender statute. In *CTS*, the Supreme Court considered a provision of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9658, that delays the running of "the applicable limitations period" specified in a "statute of limitations." 42 U.S.C. § 9658(a)(1). In its 7-to-2 decision, the Supreme Court held that this CERCLA provision did not override an applicable statute of repose. 134 S. Ct. at 2187. This Court's pre-*CTS* decision in *UBS* reached the opposite conclusion about HERA's extender provision, but did so without the benefit of *CTS*'s instructions on how courts should assess the scope of an extender provision. 712 F.3d at 141–43. The other decisions on which FDIC relies, including the Tenth Circuit's decision in *NCUA* v. *Nomura Home Equity Loan, Inc.*, 764 F.3d 1199 (10th Cir. 2014) ("*Nomura II*"), are similarly contrary to *CTS*.

Second, applying *CTS*, Judge Stanton correctly held that FIRREA does not expressly or impliedly repeal the Securities Act's statute of repose. J.A. 173–77. The extender provision's text, like the CERCLA provision in *CTS*, refers only to a singular "statute of limitations" tied to the accrual date of a claim. 12 U.S.C. § 1821(d)(14)(A). The statutory text contains no support for the FDIC's principal theory on appeal: that Congress intended FIRREA's extender provision, which refers only to "statute of limitations," to displace *all* other time limits of any kind in federal or state law whenever the FDIC brings claims as the receiver of a failed bank. Nor, after *CTS*, can the FDIC rely on assertions about FIRREA's expansive remedial purpose to overcome the extender provision's express language. FIRREA's history confirms that Congress in 1989 understood the distinction between statutes of limitations and statutes of repose. In fact, this distinction is embodied in the Securities Act itself, which contains a one-year statute of limitations, as well as the three-year statute of repose. 15 U.S.C. § 77m.

Third, this Court may affirm on the alternative ground that FIRREA's extender provision does not apply to federal Securities Act claims at all. By its terms, this provision applies only to "contract" and "tort" claims subject to a statute of limitations "under State law." 12 U.S.C. § 1821(d)(14)(A). Because the Securities Act imposes nearly strict statutory liabilities going far beyond principles of tort law, Securities Act claims do not sound in tort for purposes of FIRREA's extender provision.

STATEMENT OF THE FACTS

A. The FDIC's Complaint

Appellees are issuers and underwriters of residential mortgage-backed securities ("RMBS") offered to the public during 2006 and 2007.[4]

[4] Issuers typically create RMBS through a process known as securitization, in which a large number of mortgage loans are grouped together in a collateral pool and sold to a trust. The trust raises cash to purchase the loans by selling securities, usually called certificates, to investors, who in turn receive a portion of the cash flow generated when borrowers pay down the loans underlying the certificates. *See* J.A. 40–43.

Colonial purportedly purchased eight of those securities in the summer and fall of 2007. *See* J.A. 166.[5]

As early as December 2007, Colonial began to notice that declining home prices and limited market liquidity had adversely impacted the value of its RMBS holdings. *See* Exh. 1 to Decl. of Andrew T. Frankel in Supp. of Joint Mot. to Dismiss at 14, *FDIC* v. *Chase Mortg. Fin. Corp.*, 42 F. Supp. 3d 574 (S.D.N.Y. 2014) (No. 12-cv-6166), ECF No. 71-1 ("FDIC Report"). By June 2008, as the financial crisis worsened, the FDIC—then Colonial's principal regulator—examined Colonial's risk management policies and brought to the attention of Colonial's senior management a number of deficiencies that could threaten the bank's stability. *Id.* For instance, the FDIC warned that Colonial's "level of exposure to [RMBS] instruments was not appropriately limited." *Id.* Colonial did not adequately respond to the FDIC's concerns, and the bank subsequently failed. In August 2009, the FDIC was appointed as its receiver. J.A. 166–67.

Given its familiarity with Colonial's problems, the FDIC quickly determined the reasons for the bank's collapse. In April 2010, the FDIC's

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[5] The FDIC's action originally involved eleven securities, *see* J.A. 141, three of which Appellees did not issue or underwrite.

Office of Inspector General released a report reviewing Colonial's operations and the reasons for its failure. FDIC Report at 3. The FDIC concluded that Colonial had collapsed, among other reasons, because of its "failure to implement adequate risk management practices" in its own loan underwriting business. *Id.* at 4. Colonial also had purchased RMBS "collateralized by loans concentrated in high-growth real estate markets that eventually experienced significant market declines," and "bank management was slow to recognize and react to the deteriorating market conditions." *Id.* at 14. The FDIC then analyzed Colonial's securities portfolio, identified potential deficiencies in the bank's investments, and calculated the losses attributable to its purchases of RMBS, including the eight RMBS that are the subject of this lawsuit. *Id.* at 13–14.

Although the FDIC's report was issued in April 2010 (less than three years after Colonial allegedly purchased these eight RMBS), the FDIC waited until August 10, 2012—about five years after Colonial's purchases and nearly three years into the FDIC's receivership—to assert claims against Appellees under Sections 11 and 12 of the Securities Act. J.A. 167. In its Complaint, the FDIC alleges that the offering documents for the eight

RMBS that Colonial purchased in 2007 contained misrepresentations and omissions about the mortgage loans backing those securities. J.A. 36.

B. The Securities Act's Repose Provision

By its terms, the Securities Act provides that "*[i]n no event shall any . . . action be brought*" under Sections 11 and 12 more than three years after the public offering or sale of the relevant security. 15 U.S.C. § 77m (emphasis added). This substantive three-year repose period is an "*absolute limitation*" that "serve[s] as a cutoff" on all Securities Act claims after that date. *Police & Fire Ret. Sys. of Detroit* v. *IndyMac MBS, Inc.*, 721 F.3d 95, 107 (2d Cir. 2013) (internal quotation marks omitted). Congress established this absolute limit because of its concern that "lingering [Securities Act] liabilities would disrupt normal business and facilitate false claims." *P. Stolz Family P'ship L.P.* v. *Daum*, 355 F.3d 92, 105 (2d Cir. 2004) (quoting *Norris* v. *Wirtz,* 818 F.2d 1329, 1332 (7th Cir. 1987) (Easterbrook, J.)).

Since the 1930s, this three-year statute of repose has been an essential feature of the Securities Act. In particular, Congress recognized that its new regime of securities regulation, which imposed near strict liability, would expose securities issuers and underwriters to unprecedented civil liability. *See, e.g.*, 78 Cong. Rec. 8201 (1934) (statement of Sen. Austin) (emphasizing "exceptional circumstance in that the burden of proof is shifted around on the question of knowledge or willfulness in a misrepresentation"). Members of Congress thought the civil liability provisions would be "nothing but blackmail" without a statute of repose, for investors might "discover [misrepresentations] after the market has gone down, and after something has happened, and they are looking for mistakes, and years afterwards there is liability." 6 J.S. Ellenberger & Ellen P. Mahar, *Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934*, at 6565 (1973) (statement of Sen. Kean).

Indeed, the period of repose in the Securities Act as enacted in 1933 was ten years, but Congress quickly shortened the period in 1934 to reduce the risk of civil litigation, particularly when a security's price fell after a market or other unanticipated disruption. *See* Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881, 908. Congress did so because of its concern that the longer period was "too drastic, and [was] interfering with business," 78 Cong. Rec. 8668 (1934), and Congress thus decided "to curtail the extent to which the securities laws permit recoveries based on the wisdom given by hindsight," *Short* v. *Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1392 (7th Cir. 1990) (Easterbrook, J.). This determination to set "an outer limit [of three years] for claiming fraud or material omissions in the sale of securities is an important aspect" of Section 77m and the Securities Act generally. *Id.*

C. The FIRREA Extender Provision

Fifty-five years later, in 1989, Congress enacted FIRREA in response to the savings and loan crisis. FIRREA contains a so-called "extender" provision, which provides in part:

> Statute of limitations for actions brought by conservator or receiver
>
> (A) In general
>
> Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be—
>
> (i) in the case of any contract claim, the longer of—
>
> (I) the 6-year period beginning on the date the claim accrues; or
>
> (II) the period applicable under State law; and
>
> (ii) in the case of any tort claim (other than a claim which is subject to section 1441a(b)(14) of this title), the longer of—
>
> (I) the 3-year period beginning on the date the claim accrues; or
>
> (II) the period applicable under State law.

12 U.S.C. § 1821(d)(14)(A). (The full text of FIRREA's extender provision is reproduced in Appendix A to this Brief.)

Thus, by its terms, the extender provision lengthens the "statute of limitations" for state-law contract and tort claims brought by the FDIC on behalf of failed banks, but leaves in place any longer state-law limitations periods. *Id.* The extender provision defines the date on which "the statute of limitations begins to run" as the later of "the date of the appointment of the [FDIC] as conservator or receiver"—in this case, August 14, 2009—or "the date on which the cause of action accrues." 12 U.S.C. § 1821(d)(14)(B)(i)–(ii). This provision says nothing about displacing, extending, or altering any federal statute of repose, referring only to "statute[s] of limitations."

D. The District Court's Decision

On July 3, 2014, Appellees moved for judgment on the pleadings because the FDIC's claims were untimely under the Securities Act's three-year statute of repose, 15 U.S.C. § 77m. On September 2, 2014, applying *CTS*, Judge Stanton granted Appellees' motion. The District Court emphasized that, as with the CERCLA provision in *CTS*, the FIRREA extender provision "uses the term 'statute of limitations' multiple times," "focus[es] on claim accrual," and "describes the covered time period in the singular." J.A. 174–75. The District Court further reasoned that in the face of the Securities Act's dual-pronged time limit with "both a statute of limitations and a statute of repose, Congress chose language [in the extender provision] which focused on and changed the statute of limitations, and left the statute of repose untouched." J.A. 175. "That gives no support," the District Court emphasized, "to the FDIC's argument that [Congress] intended to replace both." *Id.*

The District Court also held that interpreting the FIRREA extender provision according to its plain terms is exactly in accord with its legislative history and purpose. "By postponing otherwise applicable times of accrual of claims in state statutes of limitations," the extender statute gives "the FDIC more time to bring claims that would otherwise have been lost, thus increasing the FDIC's ability to collect money through litigation." J.A. 176. Moreover, because the statute of limitations in the Securities Act is only one year, the District Court explained, "[t]he FDIC Extender Statute increases the statute of limitations for any 1933 Act claims brought by the FDIC as receiver to three years, thereby significantly increasing the amount of money that can be recovered by the Federal Government through litigation." J.A. 176 (internal citation, quotation marks, and brackets omitted).

STANDARD OF REVIEW

This Court reviews *de novo* the District Court's decision granting Appellees' motion for judgment on the pleadings. *See, e.g.*, *Vaughn* v. *Air Line Pilots Ass'n*, *Int'l*, 604 F.3d 703, 709 (2d Cir. 2010). Here, the only questions on appeal are legal ones: does FIRREA's extender provision, in light of the Supreme Court's decision in *CTS*, expressly or impliedly repeal the Securities Act's statute of repose, and does this provision even apply to federal Securities Act claims at all?

SUMMARY OF ARGUMENT

I. The District Court correctly held that *CTS* provides the governing legal framework for determining the scope of FIRREA's extender provision. J.A. 169–73. In *CTS*, the Supreme Court ruled that when CERCLA's analogous extender provision delays the running of "the applicable limitations period" specified in a "statute of limitations," 42 U.S.C. 9658(a)(1), such a provision does not change an otherwise applicable statute of repose. 134 S. Ct. at 2187. In its pre-*CTS* decision in *UBS*, a panel of this Court construed HERA's extender provision, 12 U.S.C. § 4617(b)(12), and reached the opposite conclusion—namely, that HERA's use of the term "statute of limitations" encompassed separate statutes of repose. 712 F.3d at

143. In reaching that conclusion, the *UBS* panel did not apply the factors that the Supreme Court in *CTS* held were relevant in assessing the import of an extender statute. Thus, this Court should not follow *UBS* or the other decisions on which the FDIC relies.

II. Applying *CTS*, the District Court correctly held that FIRREA does not expressly or impliedly repeal the Securities Act's three-year statute of repose. J.A. 173–77. The FIRREA extender provision's text, purpose, and history all demonstrate that this provision does not alter any federal statutes of repose. Like CERCLA, FIRREA's text refers only to a singular "statute of limitations" tied to the accrual date of a claim. 12 U.S.C. § 1821(d)(14)(A). FIRREA makes no mention of any exclusive and comprehensive time limit that would displace existing statutes of repose, and the Supreme Court's decision in *CTS* makes clear that the FDIC cannot avoid that result based on an argument about the statute's purported purpose.

Moreover, the FDIC's contrary interpretation violates the presumption against implied repeals of federal statutes. The Securities Act's repose period is an important substantive right for issuers and underwriters of securities to be free from near-strict statutory liability three years after the offering or sale of securities. The risk of such liability, without the protection of the statute of repose, would make it more difficult for public companies "to assess the impact of possible litigation" and "depriv[e] investors of information adequate for informed evaluation of such companies' potential liabilities." ABA Comm. on Fed. Regulation of Sec., *Report on the Task Force on Statute of Limitations for Implied Actions*, 41 Bus. Law. 645, 647 (1986). If Congress had wanted to set aside the Securities Act's established repose period for a particular set of claims—*i.e.*, securities claims brought by the FDIC as receiver—Congress needed to do so clearly and unmistakably. Instead, Congress elected to say nothing at all in FIRREA about displacing, extending, or altering any statutes of repose.

III. On its face, the FIRREA extender provision does not apply to Securities Act claims at all. Rather, it sets the applicable statute of limitations for "contract" and "tort" claims at six and three years, respectively, from the date of accrual, unless "the period applicable *under State law*" is longer. 12 U.S.C. § 1821(d)(14)(A) (emphasis added). The provision's plain text shows that Congress extended statutes of limitations only for state-law contract and tort claims, not *federal* claims—and certainly not federal claims under the Securities Act. That Act "does not permit an analogy" to tort law, and, indeed, Section 11 and Section 12 claims are "not derived from tort law principles." *Wilson* v. *Saintine Exploration & Drilling Corp.*, 872 F.2d 1124, 1127 (2d Cir. 1989) (internal quotation marks omitted).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT *CTS* GOVERNS HERE.

A. In *CTS*, the Supreme Court Held that a Federal Law Extending "Statute[s] of Limitations" Does Not Affect Statutes of Repose.

The FDIC's principal argument on this appeal is that the Supreme Court's recent 7-to-2 decision in *CTS* has no relevance to this case. Br. 10–14, 26–33. According to the FDIC, "nothing in the Supreme Court's analysis of the CERCLA provision in *CTS*" supports the judgment below. *Id*. at 11; *see also id*. at 30 ("The Extender Statute and CERCLA are different statutes, and . . . the Supreme Court's analysis in *CTS* in no way" supports the judgment below). This is clearly wrong. As the District Court recognized, *CTS* squarely addressed the question presented here: the extent to which a provision of federal law extending an applicable "statute of *limitations*" affects the operation of statutes of *repose*.

In *CTS*, the Supreme Court considered a provision of CERCLA, 42 U.S.C. § 9658(a)(1), that delays the running of "statute[s] of limitations" for certain state-law tort claims. There, to further the remediation of environmental hazards, Congress set a federal "commencement date" for limitations purposes for such state-law tort claims, which is "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the [toxic hazard]." 42 U.S.C. § 9658(b)(4)(A). Congress then provided that "the applicable limitations period for any [state-law toxic tort] action (as specified in the State statute of limitations or under common law)" would not begin to run earlier than "the federally required commencement date." 42 U.S.C. § 9658(a)(1). In other words, Congress prevented an "applicable limitations period" in a state-law "statute of limitations" from beginning to run prior to the actual or constructive discovery of injury.

The question before the Supreme Court in *CTS*—whether CERCLA's reference to a state-law "statute of limitations" also encompassed a state-law statute of repose—is directly relevant to this case. Plaintiffs in *CTS* had brought a nuisance action under North Carolina law, which contains a three-year statute of limitations and a ten-year statute of repose for such tort suits. 134 S. Ct. at 2181, 2184. Because plaintiffs had brought suit well outside the ten-year repose period, their action was untimely unless CERCLA's extender provision delayed the running of both the state-law statute of limitations *and* the state-law statute of repose. The Supreme Court held that CERCLA's reference to a "statute of limitations" means exactly what it says: it extends only *limitations* periods, not *repose* periods. *Id.* at 2182 ("[Section] 9658 mandates a distinction" between "statutes of limitations and statutes of repose.").

In claiming that *CTS* does not control here, the FDIC ignores that the Supreme Court specifically focused on the "central distinction between statutes of limitations and statutes of repose." 134 S. Ct. at 2183. As the Court made clear, those two types of separate time limits "are measured from different points," they "seek to attain different purposes," and "each is targeted at a different actor." *Id.* at 2182–83. A statute of limitations creates "a time limit for suing in a civil case, based on the date when the claim accrued," and targets a *plaintiff's* obligation to "diligent[ly] prosecut[e] known claims." *Id.* at 2182 (quoting *Black's Law Dictionary* 1546 (9th ed. 2009)). By contrast, a statute of repose "puts an outer limit on the right to bring a civil action," measured "not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant." *Id.* In other words, a statute of repose targets a *defendant's* right to "be free from liability after the legislatively determined period of time." *Id.* at 2183 (internal quotation marks omitted).

The FDIC also ignores that, in determining the scope of the CERCLA extender provision in *CTS*, the Supreme Court rejected the argument (repeated by the FDIC here) that the remedial purpose of a federal statute should trump the text and structure of an extender provision. Thus, the Supreme Court squarely held that it is "error" to treat statutory purpose "as a substitute for a conclusion grounded in the statute's *text and structure*." *CTS*, 134 S. Ct. at 2185 (emphasis added). As a result, the Court refused to hold that CERCLA's extender provision effects an "implied pre-emption" of statutes of repose based on its purpose. *Id.* at 2188. The Court emphasized that "no legislation pursues its purposes at all costs," *id.* at 2185 (quoting *Rodriguez* v. *United States*, 480 U.S. 522, 525–26 (1987) (per curiam)), and that "[c]ongressional intent is discerned primarily from the statutory text," *id.* *See also, e.g.*, *Capital Ventures Int'l* v. *Republic of Argentina*, 443 F.3d 214, 220 (2d Cir. 2006) ("[W]e start, as always, with the statutory text.").

In analyzing the text of the CERCLA extender provision, the Supreme Court deemed "instructive" that the provision "uses the term 'statute of limitations' four times (not including the caption), but not the term 'statute of repose.'" *CTS*, 134 S. Ct. at 2185. Contrary to the FDIC's position here, the Court explained that the term "statute of limitations" has "a precise meaning" that is "its primary meaning"—*i.e.*, a period of limitation, not repose. *Id.* The Court emphasized that the "clear distinction" between statutes of limitations and statutes of repose "was well enough established to be reflected" in the materials before Congress when it enacted the CERCLA provision in 1986. *Id.* at 2186. For this reason, the Court gave effect to Congress's choice of language in CERCLA: by referring only to statutes of limitations, Congress demonstrated "an evident intent not to cover statutes of repose." *Id.* at 2187.

The Supreme Court found that "other features of [CERCLA's] statutory text further support the exclusion of statutes of repose." *CTS*, 134 S. Ct. at 2186. Like FIRREA, the CERCLA provision "describ[es] the covered period in the singular," which "would be an awkward way to mandate the pre-emption of two different time periods with two different purposes." *Id.* at 2186–87. The CERCLA provision also presupposes that a cause of action has accrued, whereas a statute of repose "is not related to the accrual of any cause of action." *Id.* at 2187 (quotation marks and citation omitted). In addition, CERCLA provides for equitable tolling for minors or incompetent plaintiffs, and "the inclusion of a tolling rule in [Section] 9658 suggests that [it] is limited to statutes of limitations, which traditionally have been subject to tolling." *Id.* at 2187–88. For those reasons, the Court concluded, CERCLA "is best read to encompass only statutes of limitations." *Id.* at 2187. The same result is compelled here.

B. *UBS* Is Inconsistent with *CTS*.

The FDIC pins its appeal on this Court's 2013 decision in *UBS*. Again and again, the FDIC contends that *CTS* (decided in 2014) changes nothing, and that this Court is bound by *UBS*. Br. 9–10, 11, 14, 15–16, 26, 30, 34, 38. That is incorrect. In interpreting HERA's extender provision, the *UBS* panel obviously did not have the benefit of the Supreme Court's identification of the factors relevant to assessing the scope and impact of a federal extender provision directed solely to "statute[s] of limitations." And in concluding that HERA's extender provision reached statutes of repose, *UBS* did not examine any of those factors in the manner required by *CTS*: (i) the meaning of the term "statute of limitations" when HERA was enacted in 2008; (ii) HERA's reference to a single limitations period triggered by the accrual date of a claim; or (iii) the extent to which HERA allows for equitable tolling.[6]

Since *CTS*, Judge Swain—like Judge Stanton—has recognized that *CTS* "calls into question several aspects of the *UBS* Court's analysis." *FDIC* v. *Bear Stearns Asset Backed Sec. I LLC*, 2015 WL 1311300, at *4 (S.D.N.Y. Mar. 24, 2015) (Swain, J.).[7] In Judge Swain's view, rather than focusing on the text of the HERA extender provision as *CTS* requires, *UBS* "relied heavily on the remedial purposes discussed in the legislative history of the HERA statute and the mission of the [agency]." *Id.* at *6. As Judge

[6] Defendants in *UBS* settled before filing their petition for a writ of certiorari. This Court thereafter denied a motion by other interested parties (including several of the Appellees here) to intervene in that action to seek the Supreme Court's review of *UBS*. *See FHFA* v. *UBS Ams. Inc.*, No. 12-3207 (2d Cir. Sept. 5, 2013), ECF No. 243.

[7] "[W]here 'there has been an intervening Supreme Court decision that casts doubt on our controlling precedent, one panel of this Court may overrule a prior decision of another panel.'" *Lotes Co.* v. *Hon Hai Precision Indus. Co.*, 753 F.3d 395, 405 (2d Cir. 2014) (quoting *In re Zarnel*, 619 F.3d 156, 168 (2d Cir. 2010)). "The intervening decision need not address the precise issue decided by the panel for this exception to apply." *In re Zarnel*, 619 F.3d at 168. Rather, this Court may revisit its prior decision if "its rationale is overruled, implicitly or expressly, by the Supreme Court." *United States* v. *Ianniello*, 808 F.2d 184, 190 (2d Cir. 1986). That is exactly what *CTS* did to the rationale in *UBS*.

Swain held, *CTS* "instructs that the remedial purpose of a statute is not a license to eschew the import of the text of an extender provision as enacted by Congress," and, for this reason, "[t]he analytical framework set out by the Supreme Court in [*CTS*] . . . implicitly overrul[es] material aspects of the *UBS* decision's rationale." *Id.* at *6–7. Thus, "*UBS*, in citing the mission of the FHFA as the proper basis of an assumption that Congress would not have intended to exclude securities law claims otherwise governed by a statute of repose, appears to have taken an analytical path inconsistent with the Supreme Court's new guidance." *Id.* at *6.

Other federal courts have reached the same conclusion. *See In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, No. 2:12-cv-03279, slip op. at 4 (C.D. Cal. Dec. 8, 2014), ECF No. 196 ("*Franklin Bank*") ("[T]he [FDIC] Extender Statute unambiguously does not displace the [1933] Act's statute of repose."); *FDIC* v. *Merrill Lynch, Pierce, Fenner & Smith Inc.*, 2014 WL 4161561, at *9 (W.D. Tex. Aug. 18, 2014) ("*Merrill Lynch*") ("*UBS*'s conclusion is irreconcilable with the Supreme Court's interpretation of [CERCLA in *CTS*].").

As those courts have recognized, the two-paragraph textual analysis in *UBS* is directly contrary to the Supreme Court's rationale in *CTS*.

In *UBS*, the panel reasoned that by extending "*the* applicable statute of limitations" for actions brought by the FHFA as conservator, 12 U.S.C. § 4617(b)(12)(A) (emphasis added), "Congress intended one statute of limitations" to apply to all such actions, 712 F.3d at 143. In *CTS*, however, the Supreme Court treated virtually identical "language describing the covered period in the singular" as evidence that Congress did *not* intend to alter "two different time periods with two different purposes." 134 S. Ct. at 2186–87.[8] The *UBS* panel also reasoned that by providing the statute of limitations for "*any* action" brought by the FHFA as conservator, 12 U.S.C. § 4617(b)(12)(A) (emphasis added), "Congress precluded the possibility that some other limitations period might apply," 712 F.3d at 141–42. But plaintiffs in *CTS* made precisely that argument, *see* Brief for Respondents at 21, *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175 (2014) (No. 13-339) (arguing that because the CERCLA provision "applies to 'any action,'" it

[8] The *UBS* panel further relied on the fact that HERA's limitations period is mandatory: it "shall be" either six or three years, unless state law provides a longer period. 712 F.3d at 141. Just last week, in *United States* v. *Wong*, 2015 WL 1808750 (U.S. Apr. 22, 2015), the Supreme Court squarely rejected that argument. It held that most federal statutory time limits contain "language [that] is mandatory," and thus a statutory reference to the exact same verb tense as here—"shall be"—is "of no consequence." *Id.* at *6. Such language does not prevent a time limit from being an "ordinary, run-of-the-mill statute of limitations." *Id.* (internal quotation marks omitted).

"comprehensively addresses all state limitations periods"), and the Supreme Court emphatically rejected it.

Moreover, although the Supreme Court in *CTS* found Congress's use of the term "statute of limitations" in CERCLA to be "instructive," 134 S. Ct. at 2185, *UBS* deemed the statutory text essentially irrelevant in interpreting HERA: "Although statutes of limitations and statutes of repose are distinct in theory, the courts . . . have long used the term 'statute of limitations' to refer to statutes of repose." 712 F.3d at 142–43. The relevant inquiry here is how Congress used the term in FIRREA, and the *UBS* panel's view that the term "statute of limitations" is a catchall for time limits of any kind in construing statutes cannot be reconciled with *CTS*. As the Supreme Court recognized, Congress understood the distinction between statutes of limitations and statutes of repose when it enacted CERCLA in 1986, 134 S. Ct. at 2186, and the same understanding was necessarily present when FIRREA was enacted three years later in 1989.

The FDIC's effort to defend *UBS*'s purpose-oriented analysis is likewise at odds with *CTS*. "Congress enacted HERA's extender statute to give FHFA the time to investigate and develop potential claims," the *UBS* panel reasoned, and "[i]t would have made no sense for Congress to have carved out securities claims from the ambit of the extender statute." 712 F.3d at 142. But the Supreme Court, by a margin of 7-to-2, rejected exactly that type of reasoning in *CTS*. The Court ruled that it was "error" for the Fourth Circuit to have treated CERCLA's purpose "as a substitute" for "the statute's text and structure." 134 S. Ct. at 2185.

The panel's analysis in *UBS* is also flatly inconsistent with the presumption against implied repeals. If Congress intends one federal statutory provision to alter another federal statutory provision, it must make that intention "clear and manifest." *In re WTC Disaster Site*, 414 F.3d 352, 366 (2d Cir. 2005). But *UBS* concluded that "[i]f Congress had really wanted to *exclude* securities claims from the ambit of HERA's extender statute, it surely would have done so clearly and explicitly instead of by opaquely using the phrase 'statute of limitations.'" 712 F.3d at 143 (emphasis added). That logic turns the presumption against implied repeals on its head. Congress did not have to act clearly *to preserve* the Securities Act's repose period. Rather, Congress had to act clearly and unmistakably *to displace or repeal* it. Because *UBS* neither applied the correct legal standard nor examined the factors that *CTS* now requires, the FDIC is incorrect that *UBS* provides any basis for reversing the District Court, which faithfully followed the Supreme Court's 2014 decision in *CTS*.

C. *Nomura II* Is Inconsistent with *CTS* and a Subsequent Tenth Circuit Decision.

The Tenth Circuit's decision in *Nomura II* also does not help the FDIC. There, on remand from the Supreme Court, the Tenth Circuit reaffirmed its view that a FIRREA extender provision governing the NCUA "should be construed broadly to include statutes of repose." *Nomura II*, 764 F.3d at 1213–14. Notwithstanding *CTS*, the Tenth Circuit held that the NCUA extender provision is an "all-purpose time limit[]" that "displaces *all* preexisting limits on the time to bring suit, whatever they are called." *Id.* at 1208.[9] In reaching that conclusion, the Tenth Circuit did what *CTS* specifically forbids: it treated a federal statute that governs only "the applicable statute of limitations," 12 U.S.C. § 1787(d)(14), as encompassing "two different time periods with two different purposes," *CTS*, 134 S. Ct. at

[9] Although the Supreme Court recently declined review, *see* 135 S. Ct. 949 (2015), *Nomura II* is the first federal appellate decision to address the issue since *CTS*. The Supreme Court's determination to allow for further percolation in the lower courts—as the Solicitor General urged, *see* Brief for Respondent in Opposition at 27, *Nomura Home Equity Loan, Inc.* v. *NCUA* (No. 14-379)—does not indicate any view of the merits of *Nomura II*. *See, e.g.*, *Evans* v. *Stephens*, 544 U.S. 942, 942 (2005) (opinion of Stevens, J., respecting denial of certiorari).

2187. Simply put, the Tenth Circuit impermissibly ignored *CTS* by relying on generalizations about statutory purpose—that Congress wanted to "g[i]ve the [agency] the time it needs to do its work," 764 F.3d at 1217—instead of focusing on the text and structure of the statute.

In fact, a subsequent panel of the Tenth Circuit has recognized *Nomura II*'s shortcomings by rejecting its reasoning. In *NCUA* v. *Barclays Capital Inc.*, 2015 WL 876526 (10th Cir. Mar. 3, 2015), the Tenth Circuit held that the NCUA extender provision "is a statute of limitations, not a statute of repose." *Id.* at *5.[10] Applying *CTS*, the Court of Appeals held that the NCUA extender provision contains all the hallmarks of an ordinary statute of limitations: (i) it uses the term "statute of limitations" several times, while never mentioning repose; (ii) it "repeatedly refers to the date a claim accrues," which is "consistent with a statute of limitations but not a statute of

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10 The existing tension within the Tenth Circuit between the *Barclays* and *Nomura II* decisions lessens any concern that affirming here will create a circuit conflict. In any event, this Court is bound by *CTS* and has not hesitated to disagree with its sister circuits when the law so requires. *See, e.g.*, *United States* v. *Bonventre*, 720 F.3d 126, 131 & n.5 (2d Cir. 2013) (noting disagreement with the Tenth Circuit); *EM Ltd.* v. *Republic of Argentina*, 695 F.3d 201, 209 (2d Cir. 2012) (citing disagreement with the Seventh Circuit), *aff'd sub nom. Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250 (2014). Here, the Supreme Court's recent decision in *CTS* requires just that.

repose"; (iii) the limitations period "is not tied to a fixed statutory cutoff date," which "is characteristic of a statute of repose"; and (iv) Congress "knew how to draft a statute of repose when that is what it intended." *Id.* at *6; *see Bear Stearns*, 2015 WL 1311300, at *7 (recognizing that *Nomura II* is inconsistent with *CTS*).[11]

II. APPLYING *CTS*, THE DISTRICT COURT CORRECTLY HELD THAT FIRREA DOES NOT EXPRESSLY OR IMPLIEDLY REPEAL THE SECURITIES ACT'S STATUTE OF REPOSE.

In granting judgment on the pleadings, the District Court correctly applied *CTS* and held that, "[l]ike [S]ection 9658 of CERCLA, the FDIC Extender Statute" modifies only statutes of limitations, not statutes of

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[11] Appellant also relies heavily on *FDIC* v. *Rhodes*, 336 P.3d 961 (Nev. 2014), a 4-to-3 decision of the Nevada Supreme Court that reflects the same basic inconsistencies with *CTS* as *UBS* and *Nomura II*. Indeed, the FDIC's reliance on *Rhodes* drives home that the FDIC's interpretation of FIRREA displaces not merely *federal* statutes of repose but *state* statutes of repose as well. That interpretation raises constitutional concerns by compelling States to extend liability under their own laws for a longer time than they wish. *See In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, 966 F. Supp. 2d 1031, 1043 (C.D. Cal. 2013) (emphasizing the "federalism concerns" if "each time the FDIC files suit as receiver for a failed bank under a state cause of action, the FDIC can assert the supremacy of FIRREA's extender provision to trump state-created laws extinguishing that cause of action"). It is unlikely that Congress can command States to act in that way, *see, e.g., New York* v. *United States*, 505 U.S. 144, 166 (1992), and federalism concerns require interpreting the extender provision not to rewrite substantive state law, *see Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991).

repose. J.A. 173, 177. The extender provision's text, purpose, and history all demonstrate that this provision does not affect the operation of the Securities Act's statute of repose. The FDIC's contrary interpretation is not close to correct, much less so obvious that it overcomes the presumption against implied repeals of federal statutes.

A. The Text, Purpose, and History of the FIRREA Extender Provision Make Clear that It Applies Only to Statutes of Limitations.

1. By Its Terms, the Extender Provision Reaches Only "Statute[s] of Limitations."

a. Like CERCLA, FIRREA Expressly Refers Solely to the "Statute of Limitations," Not Any Statute of Repose.

As required by *CTS*, the District Court gave effect to the text of FIRREA's extender provision, which is entitled, "*Statute of limitations* for actions brought by conservator or receiver." 12 U.S.C. § 1821(d)(14) (emphasis added). The provision's heading, which is "a useful aid in resolving" its meaning, thus concerns solely the statute of limitations period for claims brought by the FDIC in its capacity as a conservator or receiver. *FTC* v. *Mandel Bros.*, 359 U.S. 385, 388–89 (1959); *see Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998). Here, the heading uses exactly the same language as the subsequent text, confirming that Congress addressed only limitations periods, not repose periods, in FIRREA.

The FDIC studiously ignores that, as the District Court recognized, the extender provision "uses the term 'statute of limitations' multiple times, and never uses the term 'statute of repose.'" J.A. 173. Subparagraph (A) states that "[n]otwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the [FDIC] as conservator or receiver shall be" either six years for "any contract claim" or three years for "any tort claim," unless "the period applicable under State law" is longer. 12 U.S.C. § 1821(d)(14)(A). Thus, Subparagraph (A) sets a federal limitations period for contract and tort claims brought by the FDIC on behalf of failed banks, while leaving in place "the period applicable under State law" if that period is longer. *Id.*

The FDIC likewise ignores that, having established a federal limitations period, Subparagraph (B) provides that "the date on which the statute of limitations begins to run" is the later of "the date of the appointment of the Corporation as conservator or receiver" or "the date on which the cause of action *accrues*." 12 U.S.C. § 1821(d)(14)(B)(i)–(ii) (emphasis added).[12] Congress's repeated use of the term "statute of limitations," as well as its express reliance on the concept of claim accrual (which ordinarily commences the running of a limitations period), demonstrates that FIRREA affects only statutes of limitations, not statutes of repose. All told, the text of Section 1821(d)(14) refers to a "statute of limitations" in four separate places (with a fifth reference in the heading), while making no mention whatsoever of extending, displacing, or altering applicable statutes of repose.[13]

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[12] Subparagraph (C) sets aside "the statute of limitation applicable under State law" in certain circumstances for state tort claims involving fraud or intentional misconduct. 12 U.S.C. § 1821(d)(14)(C)(i); *id.* (referring to "expiration of the statute of limitation applicable under State law").

[13] The FDIC's amici incorrectly contend that Section 1821 elsewhere uses the term "statute of limitations" as a catchall for time limits of any kind. *See* FHFA/NCUA Br. 19. Of the five provisions amici cite, two of them expressly provide for tolling, and, thus, the term "statute of limitations" refers to a limitations period in the precise sense. *See, e.g.*, 12 U.S.C. §§ 1821(d)(5)(F)(i), (8)(E)(i). The other three provisions use this term to refer to time limits for appealing adverse agency determinations. *See* 12 U.S.C. §§ 1821(d)(6)(B), (8)(D), (f)(5). Courts have long distinguished such administrative bar dates from statutes of repose. *See, e.g.*, *Doss* v. *Clearwater Title Co.*, 551 F.3d 634, 638 (7th Cir. 2008). Recently, in *Wong*, the Supreme Court held that a similar provision in the Federal Tort Claims Act, 28 U.S.C. § 2401(b), is "an ordinary, run-of-the-mill statute of limitations." 2015 WL 1808750, at *6 (internal quotation marks omitted).

Moreover, the FDIC says nothing about why, if Congress had intended to displace all preexisting time limits under Federal law, including those in the Securities Act, it chose to begin the extender provision with the modest qualification, "[n]otwithstanding any provision of any *contract*." 12 U.S.C. § 1821(d)(14)(A) (emphasis added). Instead, Congress would have said that the extender provision's time periods govern "notwithstanding any other provision of law," "notwithstanding any other provision of Federal law or the law of any State," or "notwithstanding any other provision of Federal or State law"—*i.e.*, any of the other broader *non-obstante* clauses that appear frequently throughout Section 1821 itself. *See* 12 U.S.C. §§ 1821(a)(1)(E), (c)(1), (c)(4), (e)(8)(A), (e)(8)(E), (g)(1), (i)(1), (i)(3)(A), (m)(10), (n)(5)(A)(ii), (n)(12)(A). Indeed, the reference to "contract[s]" shows that Congress had in mind only ordinary state statutes of limitations, which generally may be altered by the parties' agreements. *See, e.g.*, *Heimeshoff* v. *Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 611 (2013).

The District Court thus correctly held that, "[l]ike [S]ection 9658 of CERCLA, the FDIC Extender Statute" applies only to statutes of limitations, not statutes of repose. J.A. 173–75. Just last month, Judge Swain similarly concluded that "[t]he text of the FDIC Extender Provision, read in light of the [*CTS*] Court's analysis, thus indicates strongly that Congress did not intend to encompass both types of timing provisions when it referred to statutes of limitation." *Bear Stearns*, 2015 WL 1311300, at *5. And, as noted above, district courts in other circuits have reached the same conclusion. *See Franklin Bank*, slip op. at 6 ("The text and structure of the Extender Statute contain no mention of statutes of repose or otherwise hint at modifying time restrictions other than statutes of limitations."); *Merrill Lynch*, 2014 WL 4161561, at *5 (same).

b. Like CERCLA, FIRREA Refers to "the Statute of Limitations" in the Singular.

The FDIC brushes aside the Supreme Court's reliance in *CTS* on the fact that "[t]he text of [CERCLA Section] 9658 includes language describing the covered period in the singular," which "would be an awkward way to mandate the pre-emption of two different time periods with two different purposes." 134 S. Ct. at 2186–87; *see* Br. 29–30. Similarly here, as the District Court explained, "the FDIC Extender Statute describes the covered time period in the singular by setting forth the applicable statute of limitations and the date on which the statute of limitations begins to run, and looking to 'the period applicable under State law' and 'the date on which the cause of action accrues.'" J.A. 174 (quoting 12 U.S.C. § 1821(d)(14)); *see*

Franklin Bank, slip op. at 8 (same); *Merrill Lynch*, 2014 WL 4161561, at *6 (same).

c. Like CERCLA, FIRREA Refers in a Limited Way to "Any Action" of a Specified Type.

The FDIC argues that because FIRREA's extender provision applies to "*any* action brought by the Corporation as conservator or receiver," 12 U.S.C. § 1821(d)(14)(A) (emphasis added), "Congress intended [the provision's] time periods to apply broadly." Br. 20. But the FDIC ignores that the Supreme Court in *CTS* squarely rejected the argument that in drafting CERCLA's extender provision—which refers to "the applicable limitations period" for "any action" for certain state-law torts, 42 U.S.C. § 9658(a)(1)—"Congress intended comprehensively to address the applicable period during which a claim could be brought." Brief for Respondents at 21, *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175 (2014) (No. 13-339).

The FDIC also contends that FIRREA and CERCLA use the term "any" in ways that are "not comparable." Br. 32. But the plain text of the two statutes refutes that contention. FIRREA sets the applicable statute of limitations for "*any* action brought by the Corporation as conservator or receiver." 12 U.S.C. § 1821(d)(14)(A) (emphasis added). CERCLA sets the applicable commencement date for "*any* action brought under State law" based on personal injury or property damages caused by toxic exposure. 42 U.S.C. § 9658(a)(1) (emphasis added). In both statutes, the term "any" ensures that the federal extender provision applies to certain claims of a specified type. CERCLA defines those claims by *subject matter* (*i.e.*, toxic exposure) and FIRREA defines them by the *plaintiff's identity* (*i.e.*, the FDIC as conservator or receiver), but that definitional difference indicates nothing about the substantive scope of the statutes' respective extensions.

d. Like CERCLA, FIRREA's Limitations Period Is Tied to the Accrual Date of a Claim.

In *CTS*, the Supreme Court emphasized that the CERCLA extender provision incorporates concepts of claim accrual, reasoning that statutes of limitations—unlike statutes of repose—are tied to the accrual date of claims. 134 S. Ct. at 2187. Similarly here, the six- and three-year limitations periods for contract and tort claims in FIRREA's extender provision are tied to "the date the claim *accrues*." 12 U.S.C. § 1821(d)(14)(A)(i)(I), (ii)(I) (emphasis added). The extender provision also defines the date on which "the statute of limitations begins to run" as the later of "the date of the appointment of the Corporation as conservator or receiver" or "the date on which the cause of action *accrues*." 12 U.S.C.

§ 1821(d)(14)(B)(i)–(ii) (emphasis added). The extender provision thus relies on the accrual date as the basis for determining both the applicable limitations period and when that period begins to run.

The Supreme Court's reasoning in *CTS* applies with even greater force here. The CERCLA provision referred to accrual only implicitly, *see* 134 S. Ct. at 2187, whereas FIRREA's extender provision expressly ties the length and running of the limitations period to the date when a cause of action "accrues." 12 U.S.C. § 1821(d)(14)(B)(i)–(ii). Congress left no doubt that when it referred to "the statute of limitations," it meant only the kind of time limit that begins to run at the point of accrual—*i.e.*, a limitations period, not a repose period.

Indeed, the FDIC acknowledged as much in a recent brief in a related case. *See* Plaintiff's Mem. in Opp. to Defs.' Joint Mot. to Dismiss Compl. or in the Alternative for Summary Judgment, *FDIC* v. *Arthur*, 2015 WL 898065 (D. Md. Mar. 2, 2015) (No. 14-cv-604), ECF No. 24. There, the FDIC was appointed as the receiver for a bank and entered into a tolling agreement with four of the bank's former officers. The officers subsequently claimed that the agreement was unenforceable, and the FDIC responded that FIRREA's extender provision is an ordinary "statute of limitations" that the parties could agree to toll. *Id.* at 18. Remarkably, in making that argument, the FDIC relied expressly on *CTS* and explained, as Appellees do here, that "[u]nlike statutes of repose, [Section 1821(d)(14)] does not place an outer limit on the right to bring a civil action." *Id.* at 20. The FDIC correctly emphasized in its *Arthur* brief that FIRREA's extender provision instead "limits only the timing for filing a civil suit, and it speaks unequivocally in terms of a cause of action's accrual," *id.* at 20, and argued that the defendants "utterly ignore[] the explicit 'statute of limitations' and 'accrual' language contained in the Extender Statute," *id.* at 21. The district court in *Arthur* agreed with the FDIC that "[i]nterpreting FIRREA as a statute of limitations (rather than a statute of repose) . . . respects the plain language of the statute." 2015 WL 898065, at *5.

Moreover, the fact that the FIRREA extender provision is not tied exclusively to the accrual date of a cause of action is irrelevant. Under Subparagraph (B), "the date on which the statute of limitations begins to run" may be either "(i) the date of the appointment of the Corporation as conservator or receiver" or "(ii) the date on which the cause of action accrues." 12 U.S.C. § 1821(d)(14)(B)(i)–(ii). The first of those dates is based on when a specific event occurs—*i.e.*, the FDIC's appointment—but it does not follow that clause (i) "invokes the concept of repose." *Nomura II*, 764 F.3d at 1211. To the contrary, the date of the FDIC's appointment bears no relation at all to traditional principles of repose.

The time limit in a statute of repose is traditionally measured "from the date of the last culpable act or omission of the defendant," which here, based on the FDIC's allegations, would be the offering or sale of the securities to Colonial. *CTS*, 134 S. Ct. at 2182; *see* 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1056 (3d ed. 2010). The timing of the FDIC's appointment, of course, has nothing to do with a defendant's conduct or right to be free from liability. Rather, it is the earliest date when the FDIC as a *plaintiff* could bring a claim on behalf of a failed bank. This is a classic matter of accrual. *See, e.g.*, *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1220 (2013) ("[A] claim accrues when the plaintiff has a complete and present cause of action.") (internal quotation marks omitted). And because the date of the FDIC's appointment governs only if the appointment date is later than the date when a cause of action accrues, the sole purpose of invoking the accrual date is to delay the running of (and, thus, to extend) a limitations period. That is the opposite of what a fixed statute of repose does.

e. Like CERCLA, FIRREA Establishes a Limited Exception to Existing Statutes of Limitations.

The FDIC asserts that CERCLA is an "exception" to state law, whereas FIRREA is a "new framework" to which state law becomes the exception. Br. 31, 33. But the FDIC's only support for its assertion is that CERCLA alters the commencement date of state statutes of limitations, whereas FIRREA alters both the commencement date of such statutes and their length. *Id.* That is a distinction without a difference. Both CERCLA and FIRREA provide a statute-of-limitations framework by laying down general rules (for the commencement date or length of the limitations period) that displace, and thereby carve out narrow exceptions to, contrary state law. Even the authorities on which the FDIC relies acknowledge that basic point. *See NCUA* v. *Nomura Home Equity Loan, Inc.*, 727 F.3d 1246, 1266 (10th Cir. 2013) ("[T]he Extender Statute . . . functions as a *narrow exception* for actions brought by [the conservator].") (emphasis added); *FHFA* v. *HSBC N. Am. Holdings Inc.*, 2014 WL 4276420, at *6 (S.D.N.Y. Aug. 28, 2014) (Cote, J.) (same).[14] Indeed, FIRREA does not even affect existing state limitations periods if they are longer than specified in the extender provision.

The FDIC maintains that "[t]he CERCLA provision in *CTS* adjusted the accrual date" for state statutes of limitations, whereas FIRREA "refers to 'accrual' to describe the start of the newly created limitations period the statute establishes for the FDIC." Br. 29. The FDIC's assertion that FIRREA "create[s]" a new limitations period is at odds with its own description of FIRREA throughout its brief as an "Extender Statute." This extender provision simply lengthens existing statutes of limitations. If those statutes have expired before the date of receivership, FIRREA does not revive them. *See, e.g.*, *FDIC* v. *Schuchmann*, 235 F.3d 1217, 1229 (10th Cir. 2000). But even if the FDIC were correct that FIRREA creates a wholly new federal statute of limitations, the FDIC still would have to show that this federal limitations period is *exclusive* of all preexisting time limits, including

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[14] In *CTS*, the Supreme Court noted that CERCLA provides for equitable tolling on behalf of minors or incompetent plaintiffs, indicating "that the statute's reach is limited to statutes of limitations, which traditionally have been subject to tolling." 134 S. Ct. at 2188. Here, Section 1821(d)(14) does not include special tolling rules for particular plaintiffs because the entire provision functions as a special tolling rule for one plaintiff: the FDIC in its capacity as a conservator or receiver of a failed bank.

the established federal statute of repose in the Securities Act. It cannot do so.

2. The Extender Provision's Text Does Not Create an Exclusive and Comprehensive Time Limit on Securities Act Claims.

The FDIC's only argument for exclusivity is that the extender provision establishes "the applicable statute of limitations" that "shall be" applied to contract and tort claims in "any action" brought by the FDIC on behalf of a failed bank. 12 U.S.C. § 1821(d)(14)(A). According to the FDIC, "by creating '*the* applicable statute of limitations,' Congress demonstrated its intent for [the FDIC] to have its own *exclusive* time period in which to bring suit." Br. 21 (second emphasis added). That simply does not follow. By its terms, the extender provision does nothing more than extend a federal limitations period that applies to "contract" and "tort" claims in any action brought by the FDIC on behalf of failed banks, unless a state-law limitations period is longer. None of that remotely shows that the federal limitations period is an "exclusive" time limit or a "comprehensive timeliness provision" that displaces the statute of repose in the Securities Act. *Id.* at 21, 33.

The FDIC also begs the question by claiming that the term "statute of limitations" in Section 1821(d)(14) describes the type of time limit that the provision *establishes*, not the type of time limit that it *displaces*. *See* Br. 19–21, 29–30. Establishing a federal statute of limitations does not require setting aside federal or state statutes of repose. FIRREA's extender provision needs to extend only any shorter statute of limitations, because any law that sets a shorter statute of limitations conflicts with the extender provision—and, accordingly, must give way. Thus, the statute of limitations in FIRREA and the three-year statute of repose in the Securities Act can coexist peacefully, just as in *CTS* CERCLA's statute of limitations and North Carolina's repose period could coexist without any difficulty.

3. The Extender Provision's Perceived Remedial Purpose Cannot Override Its Text.

The FDIC invokes the extender provision's purpose, which is to allow the FDIC additional time "to investigate and determine what causes of action it should bring on behalf of a failed institution." *FDIC* v. *Barton*, 96 F.3d 128, 133 (5th Cir. 1996); *see* Br. 34–38. "This is the same basic goal-oriented reasoning rejected by [*CTS*]." *Merrill Lynch*, 2014 WL 4161561, at *8. After all, CERCLA's purpose—extending limitations periods for victims of environmental contamination—is no less significant than FIRREA's goal of extending limitations periods for the FDIC to pursue claims on behalf of failed financial institutions. *See Waldburger* v. *CTS Corp.*, 723 F.3d 434, 443

(4th Cir. 2013) (CERCLA is "not only more remedial than most legislative enactments . . . [but] arguably the most remedial of all federal environmental statutes.").

In *CTS*, the Supreme Court was clear that the Fourth Circuit had erred "when it treated [the statute's purpose] as a substitute for a conclusion grounded in the statute's text and structure." 134 S. Ct. at 2185. The Court observed that "almost every statute might be described as remedial in the sense that all statutes are designed to remedy some problem." *Id.* The Court explained that "no legislation pursues its purposes at all costs." *Id.* (quoting *Rodriguez*, 480 U.S. at 525–26). Or, put differently, "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Natural Res. Def. Council, Inc.* v. *FDA*, 760 F.3d 151, 178 (2d Cir. 2014) (quoting *Rodriguez*, 480 U.S. at 526).

In any event, by its plain terms, the FIRREA extender provision accomplishes the goal that the FDIC ascribes to it: "provid[ing] the FDIC with adequate time to perform its mission to recover bank losses." Br. 38. The extender provision does so by allowing the FDIC more time to bring "claims that would otherwise have been lost due to the expiration of hitherto applicable *limitations* periods." 135 Cong. Rec. 18,866 (1989) (statement of Sen. Riegle) (emphasis added). As the District Court explained, "[b]y postponing otherwise applicable times of accrual of claims in state statutes of limitations, the FDIC Extender Statute did give the FDIC more time to bring claims that would otherwise have been lost, thus increasing the FDIC's ability to collect money through litigation." J.A. 176.

In other words, FIRREA's extender provision furthers the goal of monetary recovery by lengthening statutes of limitations for Securities Act claims brought by the FDIC in certain circumstances, but not to the point of reviving claims that have been extinguished by governing statutes of repose.[15] Congress "extended *the applicable statutes of limitation* . . . to provide more time to carry out the investigative work" of the agency. 136 Cong. Rec. S7704 (daily ed. June 11, 1990) (emphasis added). The FDIC cites nothing in FIRREA's text or legislative history to suggest that

[15] This Court reached a similar conclusion in *Marsh* v. *Rosenbloom*, 499 F.3d 165 (2d Cir. 2007), which addressed whether a separate limitations period in CERCLA, 42 U.S.C. § 9613(g)(2)(B), preempted shorter state corporate dissolution statutes. In holding against preemption, this Court reasoned—foreshadowing the Supreme Court's analysis in *CTS*—that CERCLA's objectives are "not absolute" and should not be interpreted to displace state law simply because that would leave plaintiffs unable to recover damages. *Marsh*, 499 F.3d at 178–79. *Marsh*'s reasoning applies equally here.

Congress took the additional step of extending or displacing applicable statutes of repose, which would have fundamentally altered substantive rights under federal and state law. In the face of criticism that its proposed reforms were unnecessary, excessive, and too costly, FIRREA was a "compromise."[16] As part of that compromise, the extender provision was concerned with the FDIC's time as plaintiff to bring suit; it was not concerned with eliminating a defendant's right to be free from liability after expiration of the repose period.

4. The Extender Provision's History Confirms that It Applies Only to Statutes of Limitations.

In *CTS*, the Supreme Court stated that "the modern, more precise usage" of the term "statute of limitations" is "distinct" from the term "statute of repose." 134 S. Ct. at 2186. The Court acknowledged that "the term 'statute of limitations' is sometimes used in a less formal way [to] refer to any provision restricting the time in which a plaintiff must bring suit." *Id.* at 2185. In determining which usage Congress had employed in CERCLA,

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[16] *See* 135 Cong. Rec. S10,403 (daily ed. Aug. 15, 1989); 135 Cong. Rec. H5314 (daily ed. Aug. 4, 1989) (statement of Rep. Price); *Problems of the Federal Savings and Loan Insurance Corporation: Hearings Before the S. Comm. on Banking, Housing, and Urban Affairs*, 101st Cong. 531 (1989) (statement of Sen. Heinz); *id.* at 667 (statement of Lewis S. Ranieri).

the Court looked first to "how these terms were likely understood in 1986" at the time of CERCLA's enactment. *Id.* After a thorough inquiry, the Court held that "the concept that statutes of repose and statutes of limitations are distinct was well enough established" in 1986 to show that Congress gave the term "statute of limitations" its more precise, modern meaning in Section 9658. *Id.* at 2186.

The same reasoning applies with even greater force to FIRREA. Congress enacted FIRREA in 1989, three years after the 1986 amendments to CERCLA. In fact, FIRREA's principal drafter, Senator Donald Riegle, had introduced CERCLA in 1979, *see* S. 1480, 96th Cong., and actively participated in the legislative debates over its 1986 amendments, *see* 131 Cong. Rec. S12,161 (daily ed. Sept. 26, 1985); 132 Cong. Rec. S14,934 (daily ed. Oct. 3, 1986). Given that, as the Supreme Court said in *CTS*, Senator Riegle and his colleagues were aware of the distinction between statutes of limitations and statutes of repose in 1986, it is necessarily true that they were aware of that distinction in 1989 as well.

The FDIC observes that, in enacting CERCLA, Congress had before it a Study Group Report that distinguished between statutes of limitations and statutes of repose. *See* Br. 34. The FDIC is incorrect, however, that the absence of a similar report in FIRREA's legislative history is meaningful. The report in *CTS* was but one piece of evidence that by 1986 Congress understood the difference between limitations periods and repose periods. There is ample other evidence that Congress continued to understand the difference between statutes of limitations and statutes of repose in 1989 when it enacted FIRREA—including that Congress had relied on the distinction three years earlier in CERCLA. Moreover, the report in *CTS* showed that Congress understood that state toxic tort statutes had statutes of repose. 134 S. Ct. at 2186. Here, Congress did not need a report to tell it that federal securities claims were subject to a statute of repose: Congress wrote the Securities Act's statute of repose, which had been in the United States Code for more than half a century.

If anything, congressional understanding of the distinction between statutes of limitations and statutes of repose only deepened between 1986 and 1989. In the late 1980s, Congress distinguished between statutes of limitations and repose in several prominent proposed pieces of legislation, including the False Claims Amendments Act of 1986,[17] the General Aviation

[17] *See* Pub. L. No. 99–562, § 5, 100 Stat. 3153, 3158 (1986) (codified at 31 U.S.C. § 3731(b)) (providing that a civil action may be brought "in no event

(footnote continued)

Tort Reform Act of 1986,[18] the Economic Statute of Repose Act (1987),[19] and the Product Liability Reform Act of 1989.[20] As one district court has noted, "an electronic search of the Congressional Record from 1985 until the enactment of FIRREA reveals at least forty-four separate uses of the phrase 'statute of repose' across twenty-seven different statements by members of Congress." *In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, 966 F. Supp. 2d 1031, 1039 (C.D. Cal. 2013). That number rises to "fifty-seven separate mentions . . . across thirty different statements" if one searches for

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(footnote continued)

more than 10 years after the date on which the violation is committed"); *see also United States ex rel. Sansbury* v. *LB & B Assoc., Inc.*, 2014 WL 3509789, at *10 (D.D.C. July 16, 2014).

[18] *See* 132 Cong. Rec. H2275–76 (daily ed. Apr. 30, 1986) (statement of Rep. Hammerschmidt) (noting that, because an aircraft defect may not result in an injury for several years after it was manufactured, "we certainly need to hear from both sides of the question before settling on a specific *statute of repose*") (emphasis added).

[19] *See* 133 Cong. Rec. E3145 (daily ed. July 29, 1987) (statement of Rep. Schulze) ("I am introducing legislation to address one particular segment of the product liability crisis, the need for a basic statute of limitations, or in this case, *a statute of repose*.") (emphasis added).

[20] *See* 135 Cong. Rec. E2243–44 (daily ed. June 21, 1989) (statement of Sen. Luken) (proposing an "an outer time limit of 25 years, called *a statute of repose*, where a capital good product—that is, industrial machinery—is involved in an accident that results in traumatic injury") (emphasis added).

"'statute of repose' combined with closely related phrases such as 'statute of limitations and repose.'" *Id.* at 1039 n.3.[21]

These congressional statements reflect that the distinction between statutes of limitations and statutes of repose was well accepted by the late 1980s. *CTS*, 134 S. Ct. at 2186; *Thornton* v. *Cessna Aircraft Co.*, 886 F.2d 85, 88 (4th Cir. 1989) ("As this court has previously recognized, statutes of limitation are critically different from statutes of repose.") (citing *Goad* v. *Celotex Corp.*, 831 F.2d 508, 510–11 (4th Cir. 1987)); *Eddings ex rel. Eddings* v. *Volkswagenwerk, A.G.*, 835 F.2d 1369, 1371 n.2 (11th Cir. 1988) ("A statute of repose is to be distinguished from a statute of limitations."); *see also Black's Law Dictionary* 927, 1411 (6th ed. 1990) (defining "statute of repose" as "distinguishable from [a] statute of limitations, in that the statute of repose cuts off [a] right of action after [a] specified time measured from the delivery of product or completion of work, regardless of the time of accrual of [the] cause of action or of notice of invasion of legal rights").

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21 *See, e.g.*, 132 Cong. Rec. 9672 (1986) (statement of Sen. Kassebaum); 132 Cong. Rec. 10312 (1986) (statement of Sen. Danforth); 132 Cong. Rec. 23,721 (1986) (statement of Sen. Kasten); 132 Cong. Rec. 25113 (1986) (statement of Sen. McConnell); 133 Cong. Rec. 7879 (1987) (statement of Rep. Shumway); 133 Cong. Rec. 21,573 (1987) (statement of Rep. Schulze); 134 Cong. Rec. 28,346 (1988) (statement of Sen. Dole).

Perhaps nowhere was Congress more aware of this distinction than in the realm of financial regulation. Throughout the 1980s, many commentators cited the Securities Act's repose period as a template for various regulatory reforms. In 1987—two years before enactment of FIRREA's extender provision—Judge Easterbrook observed that the 1933 Securities Act and 1934 Securities Exchange Act "called for uniform statutes of limitations *coupled with statutes of repose*." *Norris*, 818 F.2d at 1332 (emphasis in original). Several scholars urged Congress in the 1980s to adopt similar repose periods for other causes of action, including those brought under Rule 10b-5. *See, e.g.*, Louis Loss, *Fundamentals of Securities Regulation* 1166 (1983); ABA Comm. on Fed. Regulation of Sec., *Report on the Task Force on Statute of Limitations for Implied Actions*, 41 Bus. Law. 645, 657–58 (1986).[22]

Against that backdrop, there can be no serious question that Congress understood the distinction between statutes of limitations and

[22] Indeed, contemporaneous proposed reforms to federal and state securities laws often included repose provisions modeled on Section 77m. *See, e.g.*, Uniform Securities Act of 1985 (model state securities legislation including a three-year statute of repose similar to Section 77m); *Federal Securities Code* § 1727(b)(2) (1980) (proposal by American Law Institute to create an express statute of repose applicable to implied actions).

statutes of repose in 1989 when it enacted FIRREA. Congress's decision to extend "the applicable statute of limitations" for the FDIC, 12 U.S.C. § 1821(d)(14)(A)—without ever referring, even once, to any applicable statute of repose—reflected the prevailing understanding of the distinction between limitations and repose periods.

B. The FDIC Cannot Overcome the Presumption Against the Implied Repeal of the Securities Act's Repose Period.

1. The Securities Act's Repose Period Establishes a Critically Important Substantive Right.

The federal securities law backdrop here makes it clear that FIRREA's extender provision does not impact the Securities Act's repose period. When Congress enacted FIRREA in 1989, the Securities Act had long contained two time limits on its causes of action: a one-year limitations period and a three-year repose period. Congress was aware of those time limits, but spoke exclusively in terms of a "statute of limitations" in FIRREA. *See, e.g.*, *In re Nw. Airlines Corp.*, 483 F.3d 160, 169 (2d Cir. 2007) ("We also assume that Congress passed each subsequent law with full knowledge of the existing legal landscape.") (citing *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990)).

In urging this Court to set aside the Securities Act's three-year repose period, the FDIC ignores the legislative compromises at the heart of the Securities Act and FIRREA. The Securities Act created private causes of action "to insure honest securities markets and thereby promote investor confidence." *Chadbourne & Parke LLP* v. *Troice*, 134 S. Ct. 1058, 1067 (2014). Those causes of action are "notable both for the limitations on their scope as well as the *in[] terrorem* nature of the liability they create." *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 359 (2d Cir. 2010). "[U]nlike securities fraud claims pursuant to [S]ection 10(b) of the Securities Exchange Act," claims under Sections 11 and 12 of the Securities Act do not require plaintiffs to prove scienter, reliance (in most cases), or loss causation. *Id.* As this Court has noted, Sections 11 and 12 of the Securities Act "apply more narrowly but give rise to liability more readily." *Id.* at 360.

Because of the relative ease of proving liability, Congress established a strict repose period in the Securities Act based on its "fear that lingering liabilities would disrupt normal business and facilitate false claims." *Norris,* 818 F.2d at 1332. The Act's longstanding repose period reflects a legislative determination that, once three years have passed from the public offering or sale of a security, a "company's management [may] treat a given securities transaction as closed, allowing them to proceed more confidently with running the company." *In re Data Access Sys. Sec. Litig.*, 843 F.2d 1537, 1546 (3d Cir. 1988) (internal quotation marks omitted); *see* Brief for the Securities and Exchange Commission as Amicus Curiae at 28–29 in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991) (No. 90-333), 1990 WL 10012716, at *28–29 (repose period "reflects a general congressional policy" that "potential defendants [not] be subject to contingent liabilities for indefinite periods").

This case illustrates the practical concerns supporting the Securities Act's statute of repose. The FDIC proposes to prove its claims here by serving subpoenas on numerous third parties for thousands of loan files, so that its expert witnesses can try to second-guess the decisions of mortgage underwriters, appraisers, and others who were involved in originating the loans at issue almost a decade ago. At the same time, Appellees' ability to defend against these claims has been seriously compromised by the fact that the challenged securities transactions and origination of the underlying mortgage loans occurred eight or more years ago. Many mortgage originators from that period have gone out of business or, like Colonial, had their assets transferred to third parties. Documents no doubt have gone missing, witnesses are no longer available, and memories certainly have faded.

The passage of time unquestionably harms Securities Act defendants, which face nearly strict liability subject to certain statutory affirmative defenses—among them, that a plaintiff knew the facts about its claim when it purchased the security, or that the defendant exercised due diligence or acted with reasonable care in offering the securities. *See* 15 U.S.C. §§ 77k(a)–(b), 77l(a), 77m. The Securities Act's statute of repose protects defendants against the weakening of those defenses as a result of the passage of time. In fact, the FDIC here likely will seek potentially substantial sums of prejudgment interest accruing from when the securities were sold—which would compound the injury to Appellees from a judicial abrogation of the period of repose established by Congress.

In light of those concerns, this Court correctly has viewed the Securities Act's three-year repose period as a "cutoff," *IndyMac MBS, Inc.*, 721 F.3d at 107 (quoting *Lampf,* 501 U.S. at 363), and "an absolute limitation," *id.* (quoting *Jackson Nat'l Life Ins. Co.* v. *Merrill Lynch & Co.*, 32 F.3d 697, 704 (2d Cir. 1994)) (emphasis omitted). Whereas "[s]tatutes of limitations are considered to be procedural rather than substantive," *FDIC*

v. *Howse*, 736 F. Supp. 1437, 1446 (S.D. Tex. 1990), "the statute of repose in Section [77m] creates a *substantive* right" to be free of liability after the three-year period, *IndyMac MBS, Inc.*, 721 F.3d at 109 (emphasis in original). As this Court has explained, "[u]nlike a statute of limitations, a statute of repose is not a limitation of a plaintiff's remedy, but rather defines the right involved in terms of the time allowed to bring suit." *P. Stolz Family P'ship L.P.*, 355 F.3d at 102; *see also CTS*, 134 S. Ct. at 2182–83.

Thus, as a matter of substantive securities law, Colonial had a federal right to sue for alleged misstatements made in connection with the securities it purportedly purchased in 2007—but that right was extinguished three years after the securities were offered to the public or sold. The converse is equally true: three years after offering and selling the securities at issue, Appellees had a substantive right to be free from potential liability. When the FDIC stepped into Colonial's shoes in 2009, it succeeded solely to the "rights, titles, powers, and privileges" then belonging to Colonial, including the bank's three-year extinguishable right to sue on securities that it had purchased in 2007. *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 86 (1994) (quoting 12 U.S.C. § 1821(d)(2)(A)(i)); *FDIC* v. *Ernst & Young LLP*, 374 F.3d 579, 581 (7th Cir. 2004).

To be sure, Congress could have used FIRREA to set aside the repose period for federal securities claims brought by the FDIC on behalf of failed banks. But FIRREA, like the Securities Act, represented a "compromise"—this time between the FDIC's desire to pursue claims on behalf of failed banks and third parties' need to have closure in their affairs. *See, e.g.*, 135 Cong. Rec. S10403 (daily ed. Aug. 15, 1989). As part of that compromise, FIRREA's extender provision prolonged only "statute[s] of limitations" for certain claims. Congress made no effort to alter the substantive rights afforded underwriters or issuers, including the substantive right—set forth in Section 77m—to be "free from liability after the legislatively determined period of time." *CTS*, 134 S. Ct. at 2183 (internal quotation marks omitted). This Court may not redraw that legislative bargain.

2. The Extender Provision Does Not Clearly and Manifestly Modify the Securities Act's Long Established Statute of Repose.

The FDIC in essence argues that FIRREA's extender provision impliedly repeals the Securities Act's repose period for one set of claims, *i.e.*, Securities Act claims brought by the FDIC as conservator or receiver. To accomplish such a repeal, Congress was required to say clearly and unmistakably that Section 77m's repose period does not apply to Securities Act claims like those asserted here. *See In re WTC Disaster Site*, 414 F.3d at 366 ("The intention of Congress to repeal, modify or supersede must be clear and manifest.") (quoting *In re Bear River Drainage District*, 267 F.2d 849, 851 (10th Cir. 1959)); *see also Velez* v. *Sanchez*, 693 F.3d 308, 324 (2d Cir. 2012). Instead, Congress remained silent on that score in FIRREA, saying nothing about displacing, extending, or superseding any statute of repose, much less one it had itself enacted as a basic provision of the Securities Act over fifty years before.

Because Congress did not clearly alter or displace the Securities Act's repose period when it enacted FIRREA's extender provision, this Court must read the two federal statutes in harmony and give effect to both. *See, e.g.*, *United States* v. *City of New York*, 359 F.3d 83, 97 (2d Cir. 2004) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.") (quoting *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974)). *CTS* makes that task easy. When the FDIC brings a securities claim on behalf of a failed bank, that claim must be timely under *both* FIRREA's statute of limitations *and* the Securities Act's statute of repose (as the claim in *CTS* had to be timely under both CERCLA's statute of limitations and North Carolina's statute of repose).[23]

3. The Canon that Limitations Periods Are Construed Narrowly Against the Government Does Not Apply Here.

The FDIC's amici invoke the canon that "statutes of limitation are construed narrowly against the government," *BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 95 (2006), but that canon simply does not apply here. FHFA/NCUA Br. 26–27. It governs only when the scope of a statute of limitations is ambiguous, *see BP Am. Prod. Co.*, 549 U.S. at 95, and that principle has nothing to do with this case. The question here is not whether the FDIC's claims are timely under FIRREA's statute of limitations, but whether those claims are time-barred by a separate federal statute of repose.

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[23] The FDIC's interpretation effectively would amend Section 77m by creating an exception for securities claims brought by the FDIC in conservator or receiver actions. As the Supreme Court has explained, "[i]t does not matter whether this alteration is characterized as an amendment or a partial repeal. Every amendment of a statute effects a partial repeal to the extent that the new statutory command displaces earlier, inconsistent commands, and we have repeatedly recognized that implied amendments are no more favored than implied repeals." *Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 664 (2007); *see, e.g.*, *Regan* v. *Ross*, 691 F.2d 81, 87 (2d Cir. 1982). Neither the FDIC nor the cases it cites make any attempt to distinguish *Home Builders*. *See Nomura II*, 764 F.3d at 1235 (relying upon pre-*Home Builders* case law to conclude that the extender provision draws an exception to the Securities Act's repose period).

There is no canon stating that in determining whether a statute of repose applies, or in harmonizing two statutory provisions dealing with timeliness, the Government always wins.

Moreover, the Supreme Court has held that the FDIC is *not* acting fully as the Government when it steps into the shoes of a failed bank. *See O'Melveny*, 512 U.S. at 85. When the FDIC brings the claims of a private party—rather than claims of the United States as a sovereign—the FDIC cannot invoke federal common-law rules that apply when the United States is acting in a fully sovereign capacity. *Id.*

* * *

In sum, like the 1986 CERCLA extender provision in *CTS*, the 1989 FIRREA extender provision here refers only to "statutes of limitations," not statutes of repose; incorporates the accepted distinction between limitations and repose periods; and concerns a single limitations period tied to the accrual date of a claim. In both cases, Congress's decision to extend certain "statute[s] of limitations" did nothing to disturb applicable statutes of repose. *CTS*, 134 S. Ct. at 2185.

III. THE EXTENDER PROVISION DOES NOT APPLY TO FEDERAL SECURITIES ACT CLAIMS.

The District Court's judgment may be affirmed on the additional ground that FIRREA's extender provision does not apply to federal Securities Act claims at all. *See, e.g.*, *Lotes Co.*, 753 F.3d at 399. Although the FDIC does not address this issue, Appellees presented it to the District Court, *see* Doc. No. 70, at 44–46 (Nov. 13, 2012); Doc. No. 76, at 50 (Jan. 17, 2013); Doc. No. 134, at 20 n.7 (July 3, 2014), and this Court, of course, may "sustain a judgment on any ground with support on the record," *Int'l Ore & Fertilizer Corp.* v. *SGS Control Servs., Inc.*, 38 F.3d 1279, 1286 (2d Cir. 1994).[24]

[24] Appellees recognize that this argument was briefed in *UBS*, although the *UBS* panel did not expressly address it. To the extent that *UBS* could be seen as having decided the issue, it was as part of an analysis focused on the purpose of FIRREA. *See* Part I.B, *supra*. *CTS* has since directed that the focus of such an analysis must be on the text and structure of the statute. *See Graham* v. *R.J. Reynolds Tobacco Co.*, 2015 WL 1546522, at *12 (11th Cir. Apr. 8, 2015) (citing *CTS* for the proposition that a statute's "text and structure . . . provide the most reliable indicia of what Congress has resolved itself to achieve"). Therefore, the Court may consider here whether FIRREA's extender provision applies to Securities Act claims under the framework required by *CTS*.

A. FIRREA Does Not Apply to Federal Claims.

By its terms, FIRREA's extender provision sets the applicable statute of limitations for "contract" and "tort" claims at six and three years, respectively, unless "the period applicable *under State law*" is longer. 12 U.S.C. § 1821(d)(14)(A) (emphasis added). That makes perfect sense: a uniform statute of limitations for state-law contract and tort claims brought by the FDIC lifts the burden of complying with a patchwork of state statutes of limitations. Indeed, Congress certainly could have defined the extender provision's scope more broadly. Elsewhere in FIRREA, Congress used the term "Federal law" sixteen times; "Federal or State law" seven times; and "notwithstanding any provision of Federal law or the law of any State, or the constitution of any State" four times. *See* Pub. L. No. 101-73. The stark difference between the language of the extender provision and the rest of FIRREA confirms that Congress did not intend the extender provision to apply to federal claims.

B. FIRREA Does Not Apply to Securities Act Claims.

As written, the extender provision governs only "contract" and "tort" claims, not claims brought under the Securities Act. Such federal statutory claims clearly are not contract claims, nor do they sound in tort. *See, e.g.*, *Wilson* v. *Saintine Exploration & Drilling Corp.*, 872 F.2d 1124, 1127 (2d Cir. 1989) (Section 12(a)(2) of the Securities Act "does not permit an analogy" to tort law and statutory securities claims are "not derived from tort law principles") (internal quotation marks omitted); *In re Craftmatic Secs. Litig.*, 890 F.2d 628, 637 (3d Cir. 1990) (Section 12(a)(2) claims are "not analogous to . . . tort law"). Indeed, one of the core purposes of the Securities Act was to *depart* from the common law tort regime and to impose more strict liabilities. *See MBIA Ins. Corp.* v. *Royal Indem. Co.*, 426 F.3d 204, 218 (3d Cir. 2005) (Alito, J.) ("It is well known that the federal securities laws provide broader fraud protection than the common law."). The extender provision thus does not apply to the FDIC's Securities Act claims at all.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 29(d) and 32(a)(5)-(7) of the Federal Rules of Appellate Procedure, I certify that the foregoing brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,908 words.

/s/ Robert J. Giuffra, Jr.
Robert J. Giuffra, Jr.

April 27, 2015

CERTIFICATE OF SERVICE

Pursuant to Rule 25.1(h)(2) of this Circuit's Local Rules, I certify that, on April 27, 2015, the foregoing brief was filed electronically through the appellate CM/ECF system with the Clerk of the Court and thus was served on all counsel via that system.

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April 27, 2015

APPENDIX

Section 1821(d)(14) of Title 12 provides:

Statute of limitations for actions brought by conservator or receiver

(A) In general

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be—

(i) in the case of any contract claim, the longer of—

(I) the 6-year period beginning on the date the claim accrues; or

(II) the period applicable under State law; and

(ii) in the case of any tort claim (other than a claim which is subject to section 1441a(b)(14) of this title), the longer of—

(I) the 3-year period beginning on the date the claim accrues; or

(II) the period applicable under State law.

(B) Determination of the date on which a claim accrues

For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later of—

(i) the date of the appointment of the Corporation as conservator or receiver; or

(ii) the date on which the cause of action accrues.

(C) Revival of expired State causes of action

(i) In general

In the case of any tort claim described in clause (ii) for which the statute of limitation applicable under State law with respect to such claim has expired not more than 5 years before the appointment of the Corporation as conservator or receiver, the Corporation may bring an action as conservator or receiver on such claim without regard to the expiration of the statute of limitation applicable under State law.

(ii) Claims described

A tort claim referred to in clause (i) is a claim arising from fraud, intentional misconduct resulting in unjust enrichment, or intentional misconduct resulting in substantial loss to the institution.

Section 77m of Title 15 provides:

> No action shall be maintained to enforce any liability created under section 77k or 77*l*(a)(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77*l*(a)(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77*l*(a)(1) of this title more than three years after the security was bona fide offered to the public, or under section 77*l*(a)(2) of this title more than three years after the sale.